**A Cornucopia of Potential Practice Concerns About Prohibitions to Taking the Citizenship Oath**

**Presented by Samuel D. Hyman of Burns Fitzpatrick LLP at Ashton’s College’s CPD Seminar for Immigration Practitioners on** **March 17, 2022**

*\*\* This paper is to be considered general information only and not construed as being specific legal advice concerning any particular matter.*

The purpose of this presentation and paper is to provide you with a high-level survey of potential practice issues you may confront when representing applicants for grants of citizenship under section 5 of the Citizenship Act (Act). Unless your engagement is specifically limited to filing an application, your job as representative isn’t over until your client takes their oath of citizenship and received their Certificate of Canadian Citizenship. It follows that you need to be fully aware of your client’s circumstances both before and after filing an application, especially if there is anything that might prohibit your client from taking their oath of citizenship.

The starting point of any discussion of the prohibitions from taking an oath is section 22 of the Act. Section provides:

22(1) Despite anything in this Act, a person shall be granted citizenship under subsection 5(1), (2) or (4) or 11(1) or take the oath of citizenship

1. While the person, under any enactment in force in Canada,
2. Is under a probation order,
3. Is a paroled inmate, or
4. Is serving a term of imprisonment;

(a.1) while the person is serving a sentence outside Canada for an offence committed outside Canada that, if committed in Canada, would constitute an offence under an enactment in force in Canada;

(a.2) while the person is serving a sentence outside Canada for an offence under any Act of Parliament;

(b) while the person is charged with, on trial for, subject to or a party to an appeal relating to an offence under subsection 21.1(1) or 29.2(1) or (2), or an indictable offence under subsection 29(2) or (3) or any other Act of Parliament, other than an offence that is designated as a contravention under the Contraventions Act;

(b.1) subject to subsection (1.1), while the person is charged with, on trial for, subject to or party to an appeal relating to an offence committed outside Canada that, if committed in Canada, would constitute an indictable offence under any Act of Parliament;

(c) while the person is under investigation by the Minister of Justice, the Royal Canadian Mounted Police or the Canadian Security Intelligence Service for, or is charged with, on trial for, subject to or a party to an appeal relating to, an offence under any of sections 4 to 7 of the Crimes Against Humanity and War Crimes Act;

(d) if the person has been convicted of an offence under any of sections 4 to 7 of the Crimes Against Humanity and War Crimes Act;

(e) if the person has not obtained the authorization to return to Canada required under subsection 52(1) of the Immigration and Refugee Protection Act;

(e.1) if the person directly or indirectly misrepresents or withholds material circumstances relating to a relevant matter, which induces or could induce an error in the administration of this Act;

(e.2) if, during the five years immediately before the person’s application, the person was prohibited from being granted citizenship or taking the oath of citizenship under paragraph (e.1); or

(f) if, during the 10 years immediately before the person’s application, the person ceased to be a citizen under paragraph 10(1)(a), as it read immediately before the coming into force of section 8 of the Strengthening Canadian Citizenship Act, or under subsection 10(1) or 10.1(3)

(g) [Repealed, 2017, c. 14, s. 10]

There is Ministerial discretion to waive the application of paragraph (I)(b.1) on compassionate grounds pursuant to section 22(1.1). The discretion under (I)(b.1) is limited to cases where the applicant is charged with, on trial for, subject to or a party to an appeal related to an offence committed outside of Canada that, if committed in Canada, would constitute an indictable offence under any Act of Parliament.

22(4) Despite anything in this Act, a person shall not be granted citizenship under subsection 5(1), (2) or (4) or 11(1) or take the oath of citizenship if the person, before or after the coming into force of this subsection and while the person was a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act,

1. Was convicted under section 47 of the Criminal Code of treason and sentenced to imprisonment for life or was convicted of high treason under that section;
2. Was convicted of a terrorism offence as defined in section 2 of the Criminal Code – or an offence outside Canada that, if committed in Canada, would constitute a terrorism offence as defined in that section – and sentenced to at least five years of imprisonment;
3. Was convicted of an offence under any of sections 73 to 76 of the National Defence Act and sentenced to imprisonment for life because the person acted traitorously;
4. Was convicted of an offence under section 78 of the National Defence Act and sentenced to imprisonment for life;
5. Was convicted of an offence under section 130 of the National Defence Act in respect of an act or omission that is punishable under section 47 of the Criminal Code and sentenced to imprisonment for life;
6. Was convicted under the National Defence Act of a terrorism offence as defined in subsection 2(1) of that Act and sentenced to at least five years of imprisonment;
7. Was convicted of an offence described in section 16 or 17 of the Security of Information Act and sentenced to imprisonment for life;
8. Was convicted of an offence under section 130 of the National Defence Act in respect of an act or omission that is punishable under section 16 or 17 of the Security of Information Act and sentenced to imprisonment for life; or
9. Served as a member of an armed force of a country or as a member of an organized armed group and that country or group was engaged in an armed conflict with Canada.

There is Ministerial discretion at section 22(5) to not apply a specific prohibition in subsection (4) to a permanent resident where exceptional circumstances warrant it. (In cases such as treason, offences under the National Defense Act and Security of Information Act).

Section 22(I)(b) prohibitions

Indictable offences under section 2.1.1(I):

Paid representatives who are charged with, on trial for, subject to or party to an appeal for an offence where they knowingly, directly or indirectly, represent or advise a person in connection with a proceeding or application under the Act.

Indictable offences for knowingly counseling misrepresentation under section 29.2(I) or knowingly committing misrepresentation as defined in 29.2(2)(a) (b) or (c):

29.2(1) Every person commits an offence who knowingly counsels, induces, aids or abets or attempts to counsel, induce, aid or abet any person to directly or indirectly misrepresent or withhold material circumstances relating to a relevant matter, which induces or could induce an error in the administration of this Act.

(2) every person commits an offence who knowingly

(a) for any of the purposes of this Act, directly or indirectly, makes any false representation, commits fraud or conceals any material circumstances;

(b) communicates directly or indirectly, by any means, false or misleading information or representations with the intent to induce a person to make, or deter a person from making, an application to become a citizen, to obtain a certificate of citizenship or another document establishing citizenship or to renounce citizenship; or

(c) refuses to answer a question put to him or her at an interview or a proceeding held under this Act.

Note the penalties in section 29.2(3)

1. Is guilty of an indictable offence and is liable to a fine of not more than $100,000 or to imprisonment for a term of not more than five years, or to both; or
2. Is guilty of an offence punishable on summary conviction and is liable to a fine of not more than $50,000 or to imprisonment for a term of not more than two years, or to both.

For those counselling applicants, note the mental element of intent, and what that means for you in your role as a paid representative. One who knowingly – directly or indirectly - represents or advises an applicant. When assessing the intent of your client, what is the aim, actual desire, design, end, objective or purpose of the representation, act, or document in furtherance of your client’s application – and your role in it?

The element of “knowingly” creates a different element above and beyond the mental state required with respect to the actus reus of the offence of misrepresentation under section 40(I)(a) of the IRPA. In the Citizenship Act, the offence of misrepresentation in section 29.2 requires proof of the defendant’s mental state when committing the guilty act – it must be proven there was an intent to counsel misrepresentation – knowingly counsel, induce, aid or abet, or attempt to counsel, induce, aid or abet any person to directly or indirectly misrepresent or withhold material circumstance relating to a relevant matter, which induces or could induce an error in the administration of this Citizenship Act.

There is more than one way to establish specific intent to commit an offence. An act is done willfully and knowingly when the person intends to do it and knows the nature of the act. As defined in Black’s Law Dictionary (5th edition): “An act or omission is “willfully” done, if done voluntarily and intentionally and with specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law.”

“Willful, or knowingly, is a word of many meanings, its construction often influenced by its context.”

In Black’s Law Dictionary (5th edition) the distinction between an intentional act and a negligent act is explained as follows:

“A willful act may be described as one done intentionally, knowingly, and purposefully without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly, or inadvertently. A Willful act differs essentially from a negligent act. The one is positive, and the other negative.”

Recall intent and context: willful blindness

Intent on the part of a representative can be inferred and established from willful blindness: a deliberate failure to make a reasonable inquiry of wrongdoing despite suspicion or an awareness of the high probability of its existence. Willful blindness involves conscious avoidance of the truth and gives rise to an inference of knowledge of the offence in question.

Prohibition against taking an oath for misrepresentation by an applicant and five-year bar from taking an oath: Sections 22(I) (e.1) and (e.2)

In **D’Almeida v MCI** 2018 FC 870 The applicant failed to declare 16 absences over a four-year period. The applicant sought judicial review of a decision rendered by a citizenship supervisor refusing to allow him to withdraw an application for a grant of Canadian citizenship and then refusing the citizenship application.

In his decision, the supervisor notes the prohibition set out in paragraph 22(I)(e.1) of the Act to the effect that a person shall not be granted citizenship if the person directly or indirectly misrepresents or withholds material circumstances relating to a relevant matter, which induces, or could induce an error in the administration of the Act.

A procedural fairness letter was forwarded to the applicant warning him that he might be prohibited from obtaining citizenship under paragraph 22(I)(e.1) and that the information he provided in response to the procedural fairness letter had been received and reviewed.

The supervisor confirmed to the applicant that he did not act beyond his jurisdiction in refusing to process the applicant’s request to withdraw his citizenship application on the grounds that he was currently under investigation for misrepresentation.

In D’Almeida, in dismissing the applicant’s request for judicial review, St-Louis J. ruled:

1. Misrepresentation under section 22(I)(e.1) is to be interpreted broadly in the same manner as paragraph 40(I)(a) of the IRPA.
2. Whether the misrepresentation of material circumstances was committed knowingly or not was unimportant, as it is the applicant’s responsibility to provide accurate and complete information.
3. Mens rea (intent) is not an essential element in concluding as to misrepresentation of material circumstances; and,
4. The innocent mistake exception in Medel v Canada (MEI) [1990] 2 FC 345 (CA) is to be applied exceptionally.

There are important rulings with respect to withdrawal of a filed application where misrepresentation is discovered, or alleged:

1. The Act is silent in that it does not specifically prohibit a person from withdrawing a citizenship application after an investigation for misrepresentation has been initiated.
2. The Act makes no provision as to a Citizenship officer’s authority to continue processing the citizenship application after receiving a withdrawal request.
3. Allowing a withdrawal request by an applicant in these circumstances would lead to an absurd outcome the effects of which would include rendering inoperative paragraph 22(I)(e.1) of the Act.
4. In the absence of specific case law concerning the interpretation of misrepresentation under the Citizenship Act section 22(I)(e.1), and in view of its similarities with section 40(I)(a) of the IRPA, the approach developed by the court with regard to interpreting misrepresentation under IRPA is to be followed in the Citizenship Act.

Misrepresentation: Final Point

The treatment of misrepresentation under the Citizenship Act is consistent with its treatment under the IRPA under sections 40(I)(a) and the offence provisions under section 127 and 128. The distinction between misrepresentation under section 22(I)(e.1) and section 29.2(2) is the element of intent – to knowingly engage in misrepresentation. The threshold for “criminalizing” misrepresentation as a prohibition to oath taking is the greater moral blameworthiness and culpability for having **intentionally** misrepresented.

**Fact Pattern for Discussion:**

You are the paid representative of Fred Bloggins. In 2021 you assisted Mr. Bloggins with filing his application for a grant of Canadian citizenship under section 5 of the Citizenship Act. At the time you filed his application in 2021, Mr. Bloggins was a permanent resident of Canada.

On January 1, 2022 Mr. Bloggins was playing a friendly game of soccer with his son Ronald, and some friends. The game got out of hand and some punches were exchanged between Bloggins and his 16-year-old son. The police arrived on the scene. They intervened to break up a shoving match between father and son. The officer, constable Dudley Do-right, takes down the names of father and son and tells Fred that as an adult, he should know better than to hit his son. As Do-right had left his booklet of Appearance Notices at the station, tells Fred he’ll be forwarding his report to Crown Counsel and deliver an Appearance Notice to Fred charging him with one count of Assault later when he is back on duty after the holidays.

Fred discloses his encounter with the police to you in a client meeting on January 3, 2022.

Two weeks before the January 1, 2022 incident, on December 16, 2021 your office received Fred’s invitation to attend a citizenship ceremony and take an oath of citizenship on January 9, 2022. You provided it to Fred at the January 3, 2022 meeting.

On January 8, 2022, just prior to taking the oath, Fred declared in a form he signed just before taking the oath of citizenship: “I confirm that I am not subject to any criminal or immigration proceedings since I filed my application.”

An hour before he took his oath of citizenship Fred receives an email from a Citizenship Officer asking whether, since signing his application form, he has had any problems with the police. Fred answers in the negative (no).

Fred takes the oath 30 minutes later and is issued a Canadian Certificate of Citizenship.

Fred calls you on January 10, 2022 to advise you he did not disclose the police encounter in his written declaration or the IRCC email before taking his oath, and at 10 PM last night Do-right just handed him a Notice to Appear in court on January 28, 2022, on a charge of assault by which the Crown was proceeding summarily.

Analyze and discuss.